LECK SING TRADING CO. v. TAN KIM LENG

[O.C.J. (Wan Hamzah J.) December 31, 1978]

[Kuala Lumpur — Civil Suit No. 1327 of 1978]

Partnership — Partnership dissolved — Improper for action to be brought in name of partnership after its dissolution.

Practice and Procedure — Statement of claim — Party could not in subsequent proceeding raise ground of claim not pleaded in former proceeding although it was open to him to do so — R.S.C. 1957, O.48A r.1

In 1973 in another suit, the present defendant sued the present plaintiffs, a partnership firm to recover cost of magazines sold to the firm. The firm contested the claim and denied that the magazines had been sold or delivered to it. At the trial, the firm elected not to give evidence, and judgment was given for the defendant.

In the present suit, the plaintiffs, suing as a firm, alleged that the defendant had appointed them to be sole agents in Malaysia for certain magazines. The plaintiffs alleged breach of contract on the part of the defendant in that he got others to sell copies of the same magazines in Malaysia. The defendant applied for the plaintiffs' action to be struck off. At the hearing, it was confirmed that the partnership and business of Leck Sing Trading Co. had been dissolved as from December 31, 1973.

Held, dismissing the claim: (1) it was not proper for the present suit to be brought in the name of the partnership firm as plaintiffs when the partnership had already been dissolved since 1973;

(2) a party could not in a subsequent proceeding raise a ground of claim which he did not raise in a former proceeding although it was open to him to do so.

Case referred to:-

(1) *The Hilton, Ex parte March* (1892) 67 L.T. 594.

SUMMONS-IN-CHAMBERS.

S.K. Lee for the plaintiffs.

B.K. Tan for the defendant.

Wan Hamzah J.: In 1973 Tan Kim Leng (to whom I shall refer as Tan) sued Leck Sing Trading Company, a partnership firm, in C.S. No. 432 of 1973, to recover the cost of magazines sold to the firm, particulars of which were stated in the Statement of Claim. The firm contested the claim and in its pleading denied that the magazines had been sold or delivered to it. At the trial of the suit the firm elected not to call evidence and judgment was given for Tan.

Subsequently the present suit (C.S. No. 1327 of 1978) was instituted against Tan, the plaintiffs purporting to be Leck Sing Trading Co. (suing as a firm). In this suit the plaintiffs allege that Tan had appointed them to be sole agents in Malaysia for certain magazines. These magazines were the same magazines which became the subject matter of the dispute in the earlier C.S. No. 432 of 1973. The plaintiffs in the present suit allege breach of contract on the part of Tan in that he got others to sell copies of the same magazines in Malaysia. The plaintiffs claim from Tan for the cost of their unsold magazines and for damages. Tan entered conditional appearance and now by this summons applies that this suit be struck off. At the hearing of this application counsel for the plaintiffs and counsel for Tan confirm that there is no dispute that the partnership and business of Leck Sing Trading Co. had been dissolved and terminated as from December 31, 1973. It is clear that Tan's application should be granted for reasons which I now proceed to state.

Under Order 48A rule 1 of the Rules of the Supreme Court partners carrying on business within the jurisdiction may sue in the name of the firm. Because the partnership and business of Leck Sing Trading Co. had been dissolved and terminated since December 31, 1973, in my opinion it is not proper for the present suit to be brought in the name of the partnership firm as plaintiffs.

A party cannot in a subsequent proceeding raise a ground of claim which he did not raise in a former proceeding although it was open to him to do so. The authority for this is the case of *The Hilton, Ex parte March.*[1] In that case an assignee of book debts sued one of the debtors for the debt and the trustee in bankruptcy of the assignor claimed the money and disputed the assignment on the ground that the assignee had at the time of the assignment notice of an act of bankruptcy committed by the assignor. The trustee being unsuccessful, afterwards applied to set aside the assignment upon other grounds. The trustee's application was dismissed and it was held that as the trustee might have raised these other grounds at the trial of the assignee's claim, and did not so so, he could not set them up upon the application. The alleged breach of contract in the present case was a matter which the firm could have set up in defence in C.S. No. 432 of 1973. The firm did not do so, and therefore it is not open to the firm to raise that ground in the present case.

Therefore I order that the plaintiffs' claim be struck off, with costs to the defendant.

Claim dismissed.

Solicitors: *Low & Lee; Sothi & Ang*